United States Court of Appeals

for the Second Circuit

APPELLEE'S APPENDIX

Docket No. 76-6038

IN THE

United States Court of Appeals

For the Second Circuit

JOSEPH ANTHONY CAMIRE, Infant, by his Father JAMES ANTHONY CAMIRE and his Mother GAIL MARIE CAMIRE, and JAMES ANTHONY CAMIRE and GAIL MARIE CAMIRE, Individually,

Appellants,

— against —

UNITED STATES OF AMERICA,

Appellee.

On appeal from the United States District Court for the Northern District of New York

APPENDIX OF THE APPELLEE

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APPENDIX OF THE APPELLEE

STATEMENT

The following Memoranda of Law, comprising essential elements of the Record on Appeal, underlying the District Court's Memorandum-Decision and Order, dated October 9, 1975, from which this appeal has now been taken, and correspondence, material to Appellants' arguments raised for the first time on appeal, were omitted from the "Record on Appeal", submitted to this Circuit Court by the Appellants, who have been granted leave to proceed on appeal in forma pauperis:

(1) PLAINTIFFS' MEMORANDUM OF LAW, dated August 25, 1975,

(2) DEFENDANTS' REPLY MEMORANDUM OF LAW, dated September 5, 1975,

(3) LETTER OF APPELLANTS' ATTORNEY, dated August 28, 1974, and

STATEMENT

(4) LETTER OF DEPARTMENT OF THE AIR FORCE, dated September 23, 1974.

Since §30(2) and Rule 30(f) of the Federal Rules of Appellate Procedure have authorized these Appellants, proceeding as poor persons, to dispense with an Appendix, the Appellee respectfully submits its Appendix to the Circuit Court for its consideration. References in the Brief of the Appellee to the Appellants' "Record on Appeal" will be by R., and references in the Brief of the Appellee to the Appendix of the Appellee will be by A., followed by the appropriate page number.

Respectfully submitted,

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PLAINTIFFS' MEMORANDUM OF LAW.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

JOSEPH ANTHONY CAMIRE, infant, by his father, JAMES ANTHONY CAMIRE, and his mother, GAIL MARIE CAMIRE, and JAMES ANTHONY CAMIRE and GAIL MARIE CAMIRE, individually,

Plaintiffs,

UNITED STATES OF AMERICA and CAPT. DONALD MARGER, M.D.,

Defendants.

MEMORANDUM OF LAW

LIVINGSTON L. HATCH, ESQ.
Attorney for Plaintiffs
Keeseville, New York 12944

FACTS OF CASE

See affidavits of plaintiffs Gail Marie Camire and James Anthony Camire and Attorney Livingston L. Hatch.

ISSUES

1. Was there continuous treatment by the United States Government of this infant which tolled the statute of limitations?

PLAINTIFFS' MEMORANDUM OF LAW.

2. When did the plaintiffs discover the claim, or when did they exercise reasonable diligence in discovering the claim?

3. Was this discovery within the statutory time period?

POINT OF LAW I

INFANT PLAINTIFF WAS UNDER CONTINUOUS TREATMENT UNTIL FEBRUARY OF 1973. THIS TOLLS THE STATUTE OF LIMITATIONS.

Cossick v. U.S. 330 Fed. 2d 933. Judge Friendly in that decision clearly shows that the Federal Court does not adopt a mechanical approach to the statute of limitations, but rather takes the position that the Federal Courts recognize the continuous treatment doctrine. In this case, the court looks at Borgia v. the City of New York 12 N.Y. 2d 151 in showing that the continuous treatment does not only apply to the physician-patient relationship but to the patient-hospital relationship. To use the logic of Judge Desmonds that the infant in the instant case should have commenced his action while he was under the care and treatment of the United States Government, in the instant case the medical records clearly reflect that the infant was under constant curative treatment in government hospitals or rehabilitation centers sponsored under the federal government until February of 1973.

In the motion to dismiss the claim against Capt. Donald Marger, M.D., the U.S. Attorney cites Barr v. Matteo 360 U.S. 564 and Ove Gustavsson Contracting Company, Inc. v. Floete 299 F. 2d 655 for the proposition that Capt. Donald Marger, M.D., is protected by the doctrine of absolute immunity from personal liability for those acts which occur within a scope

of his employment. The logic set forth in Cossik (supra) and Borgia (supra) as to the continuity of the physician-patient relationship and the necessity of preserving this relationship for good medical treatment would appear to be unnecessary because the federal case law relieves the doctor of any liabilities for his negligent acts and places that liability on the defendant doctor's employer, the U. S. Government. It would appear that the U. S. Government's continuing relationship as hospital-patient relationship is fixed by case law. In the instant case, as has been previously shown, the infant was under constant care and treatment of the U. S. Government and specifically the Plattsburgh Air Force Base on June 6, 1972. Accardi v. U. S. 356 Fed. Supp. 218 and Accardi v. U. S. 372 Fed. Supp. 205 establishes the principle that not only does the Federal Government recognize the physician-patient relationship as to the continuous treatment rule but also as to the hospital-patient relationship. A review of the medical records shows that the infant was under medical treatment to alleviate sequel of injuries caused by the acts of one of its employees, Capt. Donald Marger, M. D., up until February of 1973. With the logic of these cases, the statute as it applies to the U. S. Government, who is the employer of Capt. Donald Marger, M. D., was tolled until February of 1973 and did not commence to run until the discontinuance of the relationship of the hospital-patient relationship. The claim filed in January of 1974 was within the two-year time limit.

PLAINTIFFS' MEMORANDUM OF LAW.

POINT OF LAW II

THE PLAINTIFFS COULD NOT HAVE REASONABLY DISCOVERED THE MALPRACTICE BEFORE JUNE OF 1972.

Quinton v. U.S. 304 Fed. 2d 234; Beech v. U.S. 345 Fed. 2d 872; Hungerford v. U.S. 307 Fed. 2d 99; Ashley v. U.S. 413 Fed. 2d 490; Coyne v. U.S. 411 Fed. 2d 887; Portis v. U.S. 483 Fed. 2d 670; Tyminski v. U.S. 481 Fed. 2d 257; Ciccarone v. U.S. 486 Fed 2d 253; Accardi v. U.S. (supra); Jordon v. U.S. 503 Fed. 2d 820; Kuhne v. U.S. 266 Fed. Supp. 649; Cooper v. U.S. 442 Fed 2d 908; U.S. v. Carson 360 Fed. Supp. 842; and Toal v. U.S. 438 Fed. 2d 222. These cases all take the position that in a medical malpractice case against the U.S. Government when the claims were not filed within the two-year period as prescribed by the statutes, the courts looked to the facts to try to determine when, with reasonable diligence, should the plaintiff have discovered, or when the plaintiff actually discovered, the malpractice. Each of these cases look to Urie v. Thompson 337 U.S. 163 and adopt the blameless ignorance rule in that the courts feel that to use a mechanical application of the law would cause a serious injury to a plaintiff who, because of his lack of knowledge and information, was unable to discover the true facts to enable him to make a proper claim. In applying the reasonable diligence rule to the instant case, it would appear that the mother initially became aware of the possibility of a misdiagnosis in June of 1972 and a malpractice in July of 1973. The claim was interposed within the proper statutory period of time.

In reviewing all the cases under this reasonable diligence rule, it would appear that the Court looks at the nature of the injury, the position of the parties, the

education and background of the plaintiffs, and the promptness of filing of the claim after the discovery of the malpractice. Hungerford v. U. S. (supra) is a case involving improper diagnosis. In that case they set forth the government's obligation in the diagnostic process. It would appear that in the federal cases there is a great deal of emphasis placed on the traumatic sequel and the proximity of the injuries. In the instant case the failure to diagnose a contagious disease does not show a traumatic sequel which is obvious to a layman. In the failure to diagnose and to treat cases, we are not dealing with an act of commission but with an act of omission and a layman never knows what the doctor should have done in the diagnostic process. That is something that is strictly within the scope of medical knowledge. In the instant case it is possible that the plaintiffs may have never known what the truth was in this case except as a result of certain factors that happened to come together at one time.

The motion for summary judgment should be dismissed, and/or in the alternative, a hearing be had on the issues raised in this matter.

ARGUMENT

A review of all the case law decided under 28 U. S. C. Subd. 2401 shows that the courts try to avoid the harsh application of the rule and try to use logic and compassion to avoid the mechanical applications of the section. To hold this infant plaintiff and his parents to the statute of limitations would seem to make these ordinary people have a standard higher than the doctor was required to exhibit. The U. S. Attorney's argument in his motion to dismiss is that these plaintiffs should have been aware of the malpractice when it occurred.

PLAINTIFFS' MEMORANDUM OF LAW.

The U. S. Attorney is requiring standards that are not usually applied to a reasonable man.

CONCLUSION

Wherefore, the motion to dismiss should be denied, and/or a hearing granted on the issues in this motion.

August 25, 1975

Respectfully submitted,

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DEFENDANTS' REPLY MEMORANDUM OF LAW.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

JOSEPH ANTHONY CAMIRE, infant, by his father, JAMES ANTHONY CAMIRE, and his mother, GAIL MARIE CAMIRE, and JAMES ANTHONY CAMIRE and GAIL MARIE CAMIRE, individually,

Plaintiffs,

vs.

UNITED STATES OF AMERICA and CAPT. DONALD MARGER, M. D.,

Defendants.

DEFENDANTS' REPLY MEMORANDUM OF LAW

JAMES M. SULLIVAN, JR.
UNITED STATES ATTORNEY
NORTHERN DISTRICT OF
NEW YORK
Attorney for Defendants
U. S. Post Office & Courthouse
Albany, New York 12207

BY: s/ RICHARD K. HUGHES
RICHARD K. HUGHES
ASSISTANT U. S. ATTORNEY

DEFENDANTS' REPLY MEMORANDUM OF LAW.

I. ARGUMENT

A. POINT I. THE MOTION TO DISMISS THE COMPLAINT AGAINST CO-DEFENDANT, CAPT. DONALD MARGER, M. D., SHOULD BE GRANTED WITHOUT OPPOSITION.

The plaintiffs' Memorandum of Law and opposing Affidavits address themselves exclusively to the potential liability of the federal government for the alleged malpractice of co-defendant, and former federal employee, CAPT. DONALD MARGER, M. D. It would appear that the plaintiffs have now conceded that Dr. Marger is insulated from personal liability for his alleged misdiagnosis of the infant plaintiff, JOSEPH ANTHONY CAMIRE, under the judicial doctrine of absolute executive immunity, annunciated in Barr v. Matteo, 360 U. S. 564 (1959), and Ove Gustavsson Contracting Co., Inc. v. Floete, 299 F. 2d 655 (2d Cir. 1962). [See: Plaintiffs' Memorandum of Law, at page two].

B. POINT II. THE NEW YORK DOCTRINE OF CONTINUOUS TREATMENT IS INAPPLICABLE TO THE PRESENT CAUSE OF ACTION.

As noted in the federal defendant's original Memorandum of Law, dated January 16, 1975, at pages 6-8, the legal principle of continuous treatment, which extends the applicable statute of limitations, was founded upon the claimant's ongoing contact with the wrongdoing hospital or physician, not simply a claimant's contact with governmental medical facilities. In the present case, the infant plaintiff had his final contact with the only alleged wrongdoer, CAPT. DONALD MARGER, M. D., during April, 1971.

DEFENDANTS' REPLY MEMORANDUM OF LAW.

In Kossick v. United States, 330 F. 2d 933 (2d Cir. 1964), upon which the plaintiffs so heavily rely, [See: Plaintiffs' Memorandum of Law, at page two], the Second Circuit affirmed the District Court's dismissal of the plaintiff's complaint on the grounds that the action was untimely. In its dicta, the Circuit Court, at page 936, discussed the New York doctrine of continuous treatment, and determined that, despite the New York "Borgia rule," the state courts would probably also have barred relief for the plaintiff.

The Circuit Court stated, "It would be unreasonable to postpone the beginning of the limitation period so long as Kossick exercised his statutory right to demand further treatment at the Hospital, 42 U. S. C. §249 — a period that will never expire so long as he is a seaman."

This "absurdity" is exactly what the present plaintiffs argue for in requesting that the District Court determine that their claim did not accrue until February of 1973, when the co-plaintiff, JAMES ANTHONY CAMIRE, was discharged from active military service. [See: Accardi v. United States, 372 F. Supp. 205 (S. D. N. Y. 1974)].

C. POINT III. THE PLAINTIFFS DISCOVERED, OR SHOULD HAVE REASONABLY DISCOVERED IN THE EXERCISE OF DUE DILIGENCE, THE EXISTENCE OF THE ALLEGED MALPRACTICE ON OR ABOUT APRIL 27, 1971, MORE THAN TWO YEARS PRIOR TO THEIR FILING OF THEIR ADMINISTRATIVE CLAIM.

The prior admissions of the plaintiffs, concerning their actual notice of the alleged misdiagnosis of Dr. Marger, contained in their administrative claim and complaint, have already been brought to the District

Court's attention, [See: Federal Defendant's Memorandum, dated January 16, 1975, at pages 4-5].

In paragraph six of her opposing Affidavit, sworn to on August 26, 1975, co-plaintiff, GAIL MARIE CAMIRE, states that upon the initial admission of the infant plaintiff, JOSEPH ANTHONY CAMIRE, to the Balboa Naval Hospital, she was advised by the hospital staff that the emergency room physician "suspected that the child had meningitis...and that the child should be baptized and given the Last Rites."

A few days prior to this diagnosis of a potential fatal illness, however, this same Affiant had allegedly been advised by Dr. Marger that the infant had a "common cold and/or was cutting teeth". The Affiant is a high school graduate, (Affidavit, paragraph two). In view of the wide disparity between the nature and severity of the two diagnosis's, the reasonable man would have been immediately allerted to the possibility of a misdiagnosis by the original treating physician. It does not require special medical expertise for a layman to know that a common cold is totally unrelated to meningitis, and that the latter disease almost always carries permanent, crippling after-effects. It is hard to conceive that this plaintiff, lacked actual knowledge of the alleged malpractice and misdiagnosis in April, 1971. If she were unaware, however, she still failed in the exercise of due diligence to timely discover its potential existence.

In Point II of their Memorandum, at page three, Plaintiffs rely heavily upon Urie v. Thompson, 337 U. S. 163 170 (1949) for the federal court's application of the principle of "blameless ignorance." It is respectfully submitted that this case is not in point. In that case, there was no suggestion that the plaintiff should have known that he suffered from the lung disease,

silicosis, prior to its diagnosis in 1940. It appeared that the plaintiff probably contracted the disease in 1938, or more than three years prior to the commencement of suit, which commencement was alleged to be after the expiration of the applicable statute of limitations. In the present case, however, it has always been the position of the defendants, on the basis of the plaintiffs' own admissions, that this knowledge was acquired more than two years prior to the expiration of the applicable statute of limitations, 28 U. S. C. §2401 (b).

II. CONCLUSION

For all the foregoing reasons, the Complaint should properly be dismissed against both defendants with prejudice and costs.

Dated: September 5, 1975
Albany, New York

JAMES M. SULLIVAN, JR.
UNITED STATES ATTORNEY
NORTHERN DISTRICT OF NY
Attorney for Defendants
U. S. Post Office & Courthouse
Albany, New York 12207

By s/ RICHARD K. HUGHES
Richard K. Hughes
Assistant U. S. Attorney

LETTER, dated 8-28-74

LIVINGSTON L. HATCH
Attorney At Law
Village of Keeseville
Office & Civic Center
Keeseville, New York
12944

Essex Road
Willsboro, NY
12996

August 28, 1974

Colonel William A. Martin, USAF
Chief, Claims Division
Office of the Judge Advocate General
Department of the Air Force
Headquarters United States Air Force
Washington, D.C. 20314

Re: Claim of Joseph Anthony Camire, James Anthony Camire and Gail Marie Camire

Dear Col. Martin:

I was in contact with the legal officer at the Plattsburgh Air Force Base. We have been trying to locate the records of this infant. No one seems to know where they are. I contact Dr. P. J. Goscienski who informed me that two sets of the records were forwarded to the Plattsburgh Air Force Base. I was informed by Plattsburgh that the records were sent to you.

I would appreciate your forwarding to me at least one copy of the records for my files.

I would hope that we could do this without my making application to the Northern District Court to direct the Government to turn over those records to me.

I anticipate your cooperation in this matter.

Very truly yours,

LLH:eah

s/Livingston L. Hatch

LETTER, dated 9-23-74.

Livingston L. Hatch
Attorney at Law
Front Street
Kesseville, NY 12944

23 SEP 1974

Re: Claim of Joseph Anthony Camire, James Anthony Camire and Gail Marie Camire

Dear Mr. Hatch

The medical records of Joseph A. Camire that you requested in your August 28, 1974 letter to this division are attached.

Sincerely

/S/
WILLIAM A. Martin, Colonel, USAF
Chief, Claims Division
Office of The Judge Advocate General

1 Atch
Joseph A. Camire
Medical Records

JACC COORD
JACC READ
JA READ
JASOC
Capt Duffy